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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

THE DELAWARE AND HUDSON RAILROAD CORPORATION,

Appellant,

against

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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November 30, 1966

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

Appellant, The Delaware and Hudson Railroad Corporation (D&H), appeals from the Order of the United States District Court for the Southern District of New York entered on October 4, 1966, denying appellant's motion for an interlocutory injunction enjoining the operation of, and the taking of any steps to make effective, certain Orders of the Interstate Commerce Commission (Commission) authorizing the merger of Pennsylvania Railroad Company (Penn) and New York Central Railroad Company (Central).

Opinions Below and Commission Reports and Orders

The majority and dissenting opinions of the United States District Court of three Judges for the Southern District of New York are not yet reported. Copies of such opinions have been attached as Appendix A to the Jurisdictional Statement heretofore filed on behalf of Baltimore and Ohio Railway Company, et al. against the United States of America on a separate appeal (No. 642) from the Order of the Court below. To avoid unnecessary duplication, reference is hereby made to said Appendix for said opinions.*

The Report and Order of the Commission approving the proposed merger, dated April 6, 1966, is reported as *Pennsylvania Railroad Company—Merger—New York Central Railroad Company*, 327 I.C.C. 475 (1966). The Commission adopted, but did not repeat in its Report, the account of the facts contained in the Recommended Report of the Hearing Examiners, served March 29, 1965, and also adopted the Examiners' proposed conditions, findings, and conclusions not modified or rejected in the Commission's Report (327 I.C.C. 475, 481-82). The Examiners' Recommended Report, which is 446 pages in length plus numerous appendices, has not been reported although it is intended to be attached to the Report and Order of April 6, 1966 when bound in the permanent series of Commission reports. (*Ibid.*) Accordingly, copies of the Recommended Report, marked as Appendix B hereto, are being filed for this Court's reference with the Clerk of the Court simultaneously with the filing of this brief.**

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* Reference to pages of said opinions as printed in the Baltimore & Ohio's Jurisdictional Statement will be identified as "A- ".

** Copies of Appendix B are being served only on appellees who were not parties to the Commission proceedings.

The Report (but not the accompanying Order) of the Commission on reconsideration, dated September 16, 1966, is reported at 328 I.C.C. 304 (1966).* A further Order, dated September 29, 1966, setting further hearings in these proceedings, is not reported but a copy thereof is attached as Appendix C to the aforesaid Jurisdictional Statement of The Baltimore and Ohio Railroad Company, et al., to which reference is hereby made.**

Jurisdiction

The Order of the United States District Court for the Southern District of New York appealed from was entered on October 4, 1966. Notice of appeal to this Court from that Order was filed in said District Court on October 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. §1253.

Statutory Provisions Involved

The statutory provisions involved, set forth in the Appendix A to this brief, are as follows:

> Interstate Commerce Act, Sections 5(2)(a), (b), (c) and (d), 5(9), 5(11), and 15(8), 49 U.S.C. §§5(2)(a), (b), (c) and (d), 5(9), 5(11) and 15(8);
>
> Judicial Code, 28 U.S.C. §§1253, 1336, 2284, and 2321-25;

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* Due to the fact that the D&H Jurisdictional Statement makes reference to pages of the September 16 Report and Order as printed in Appendix B to the Jurisdictional Statement of the Baltimore and Ohio et al., we will continue to make references herein to such Appendix (pages being identified as "B- ") rather than to the printed report.

** References to pages of said Order as printed in the Baltimore and Ohio's Jurisdictional Statement will be identified as "C- ".

Administrative Procedure Act, Sections 5(b), 8(b), 10(a), (c), (d) and (e), 5 U.S.C. §§1004(b), 1007(b), 1009(a), (c), (d) and (e).

Questions Presented

1. Whether the Commission and the District Court erred in concluding that the Penn-Central merger may lawfully be consummated prior to determination of essential conditions found necessary in the public interest for protection of D&H and other railroads.

2. Whether the conditions contained in the Commission's Orders authorizing immediate consummation of the Penn-Central merger provide inadequate protection for D&H and its service and are therefore not just and reasonable.

3. Whether the District Court erred in concluding that D&H's interests would be adequately protected if its right of judicial review were confined to determinations by the Commission as to the conditions for protection of D&H made subsequent to consummation of the merger.

4. Whether the Commission's Orders authorizing immediate consummation of the Penn-Central merger are supported by a rational basis or by necessary findings; and whether the District Court's upholding of said Orders on the basis which it employed constituted a violation of the applicable rules governing the exercise of judicial review of administrative orders.

Statement of the Case

1. History of The Recent Railroad Merger Movement in the East.

During the last six years, railroad managements of the larger Eastern railroads have taken steps to combine the numerous Eastern railroads into three systems, all of which have received approval of the Commission.

On December 17, 1962, the Commission approved, and there has become effective, control by the Chesapeake and Ohio Railroad Company (C&O) of the Baltimore and Ohio Railroad Company (B&O), including the latter's substantial interests in its several so-called family lines, the Western Maryland Railway Company (WM), the Reading Company (Reading), and the Central Railroad Company of New Jersey (CNJ).*

On June 24, 1964, the Commission approved in Finance Docket No. 21510 *et al.*, and there has become effective, the merger into the Norfolk and Western Railway Company (N&W) of the New York, Chicago and St. Louis Railroad Company (Nickel Plate), the lease of the Wabash Railroad properties (Wabash), the acquisition of stock control of the Akron, Canton and Youngstown Railroad Company, the lease of the Pittsburgh and West Virginia Railway properties, and the purchase of the Sandusky Line theretofore owned by Penn.** By a condition set forth in Appendix O to the Report and Order authorizing these transactions (324 I.C.C. 1, 148) the Commission reserved jurisdiction to hear petitions for inclusion in the N&W system of D&H, Erie-Lackawanna Railroad Company (EL) and Boston and

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* *Chesapeake & O. Ry.—Control—Baltimore & O. R.R.*, 317 I.C.C. 261 (1962), aff'd *sub nom. Brotherhood of Maintenance of Way Employees* v. *United States*, 375 U.S. 216 (1963).

** *Norfolk & W. Ry. and New York, C. & St. L. R.R.—Merger*, 324 I.C.C. 1 (1964).

Maine Corporation (B&M) and to require such inclusion, if found consistent with the public interest, on equitable terms after hearings thereon.

On April 6, 1966, the Commission in Finance Docket No. 21989 approved the merger of Penn and Central and the subsequent inclusions, on terms yet to be established, of the New York, New Haven and Hartford Railroad Company (NH or New Haven) and the New York, Susquehanna and Western Railroad Company in the Penn-Central system.

The Penn-Central merger application was filed in 1962 and for several years it was generally considered that all the principal Eastern railroads, except for special situations such as industry-owned roads and certain others, would be combined into either the C&O system, the N&W system or Penn-Central. However, on October 11, 1965, the already expanded N&W and C&O systems filed a joint application with the Commission requesting approval of their merger into a single system.* N&W and C&O have stated that if they are merged they are willing to offer to include in their system the D&H, EL, B&M, Reading and CNJ on numerous specified terms under what N&W and C&O have called the "Dereco Plan". (R. 1335-36)

Penn is now the largest railroad system in the country, and Central the third largest, in terms of gross revenues. (R. 18) The essence of the N&W-C&O proposal is that (in the judgment of those two systems) the adverse effects of a Penn-Central combine on the other affected railroads in the East would be so serious that they should all be united into one system in order to be able to compete adequately with Penn-Central. Hearings on the proposal for an N&W-C&O merger have been deferred** because of

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* Pending before the Commission in Finance Docket No. 23832.

** By Order of the Commission in Finance Docket No. 23832 dated October 5, 1966.

the pending petitions of D&H, EL and B&M for inclusion in N&W which were filed with the Commission in September, 1965 pursuant to Appendix O (mentioned above) in Finance Docket No. 21510, which petitions are discussed below.

Penn and Central have announced their outright opposition to the N&W-C&O merger proposal. (R. 342) Thus, what for several years appeared to be general acceptance by the railroad industry in the East of a three system set-up has turned into a major controversy over the merits of such an alignment as against a two-system arrangement.

2. D&H Participation In The Eastern Railroad Merger Movement.

When the development of these large systems for the East began, D&H's need for merger was by no means as great as that of certain other Eastern rail carriers. However, D&H believes that rail mergers in the East are desirable, provided they can be accomplished without substantial impairment of the ability of other railroads to serve the public. As discussed below, a Penn-Central system would impair D&H's ability to continue adequate service. Since this was immediately apparent, D&H necessarily, in the overall public interest as well as in the interests of its thousands of security holders and employees, was required, assuming approval of Penn-Central, to seek protection through inclusion in one of the large systems. (R. 17-18, 34)

Normally, a railroad so adversely affected would be considered immediately a candidate for inclusion in the system injuring its ability to perform adequate transportation service. However, D&H, EL and B&M have first sought inclusion in N&W in the interests of preserving rail competition. EL, D&H and B&M would form a rail system in connection with the N&W, whose lines do not extend east

of Buffalo, N. Y. or north of Hagerstown, Md., which would provide routes in the Northeast competitive with those which a Penn-Central combine would have. (R. 21, 1558)

After first being rebuffed (R. 1558-59), D&H succeeded in convincing the Commission in the N&W-Nickel Plate-Wabash case in Finance Docket No. 21510 that it should impose on N&W, as a condition to proceeding with the unifications there approved, a retention in the Commission of jurisdiction to require N&W subsequently to include D&H, as well as EL and B&M, in the N&W system on equitable terms if the Commission should find such inclusion consistent with the public interest, as authorized under Section 5(2)(d) of the Interstate Commerce Act. In order to preserve their service, D&H, EL and B&M have each sought inclusion in the Penn-Central system itself if for any reason not included in N&W. (R. 1559-60)

To date, efforts to achieve inclusion of D&H in the N&W system have failed. N&W refused voluntary negotiation (1) because of the adverse effects of a Penn-Central merger on D&H, EL and B&M which, N&W contends, would not be offset by their inclusion in N&W, (2) because of the financial condition, particularly the heavy debt structure of the EL, and (3) because if EL is not included there is no physical connection between N&W and D&H.* Efforts to negotiate inclusion proving futile, D&H, as well as EL and B&M, filed petitions for inclusion in N&W in Finance Docket No. 21510 pursuant to the authorization above referred to. N&W has vigorously contested such petitions.

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* N&W contends that the trackage right for D&H over the lines of the Penn to connect the D&H's southern terminus at Wilkes-Barre, Pa., with the N&W's northern terminus at Hagerstown, Md., referred to in the Commission's Reports of April 6 (327 I.C.C. 475, 527-28) and September 16 (B-32-34), would be of no value even if ultimately granted. (R. 1561)

Hearings have been held, briefs filed and the matter is now awaiting a recommended report from the hearing examiner. (R. 21-23, 1561-62)

The Commission in the Penn-Central case has authorized the filing by D&H, EL and B&M of supplemental petitions for inclusion in the Penn-Central system if their petitions for inclusion in N&W are finally denied. N&W, however, has already made clear its opposition to inclusion of any of the three roads in the Penn-Central system on the ground that such inclusions would effect a Penn-Central monopoly of rail transportation in New England and most of New York State. Thus N&W is contending that the only system in which D&H, EL and B&M may be included consistently with the public interest is the proposed N&W-C&O system, to which Penn and Central are bitterly opposed. As a consequence of this controversy between the four large systems, there is substantial uncertainty at this time when, or whether, D&H, B&M and EL will ever be included in any system. (R. 342)

3. D&H Traffic and The Effect Of Penn-Central.

D&H is principally a freight carrying railroad. Its gross freight revenues amounted to slightly over $40,100,000 in 1965. Gross revenues from all other sources, including a small amount of passenger service, amounted to slightly over $1,900,000 in 1965. (R. 1327)

Part of the evidence introduced by D&H before the Commission in the hearings in the Penn-Central merger proceeding was a detailed study based on 1961 operations as to the consequences of a Penn-Central merger on D&H's freight traffic and revenues. That study showed potential diversion of D&H freight traffic, amounting to a loss of $19,500,000 in gross freight revenue, to a Penn-Central system. It was estimated that of this potential loss of

D&H traffic to Penn-Central there would be an actual loss to D&H, annually, of traffic producing about $4,120,000, or 10% of its gross revenues. (R. 1327-28) The reasons for these losses appear from the facts set forth below.

Penn operates over 9,700 miles of road in thirteen states: Pennsylvania, New York, New Jersey, Delaware, Maryland, Virginia, West Virginia, Ohio, Indiana, Missouri, Illinois, Michigan and Kentucky, and the District of Columbia. It serves such major cities as Chicago and St. Louis in the Middle West and New York, Philadelphia, Baltimore and Washington, in the East. Its principal controlled subsidiaries, including the Lehigh Valley Railroad Company (LV) the line of which extends from New York to Buffalo, operate nearly 2,200 additional miles of road in various states. (R. 1328)

Central and its principal controlled subsidiary operate over 10,150 miles of road in eleven states: Massachusetts, New York, New Jersey, Pennsylvania, Ohio, Indiana, Illinois, Michigan, Kentucky, West Virginia and Missouri, and in the provinces of Ontario and Quebec in Canada. Central also serves Chicago and St. Louis in the Middle West and extends through New York State via Buffalo and Albany to New York City and to Boston. In addition, Central has its own line to Montreal, Canada. (R. 1328)

D&H operates in the States of Pennsylvania and New York and, to a minor extent, Vermont. Its main line runs generally northeast from Wilkes-Barre, Pa. and Owego and Binghamton, N. Y. on the south and west to the New York Capital District (which includes Albany, Schenectady, Troy and Mechanicville) and then north to Montreal. Approximately half of the D&H traffic both originates and terminates off its lines, moving to or from northern New England or eastern Canada, and D&H is thus commonly known as a "bridge" line. (R. 1329)

Today the D&H has a principal interchange connection with Penn at Wilkes-Barre. D&H also has substantial interchange of traffic with the Penn subsidiary, LV, at Owego. D&H's other principal connections on the west and south of its lines are the EL at Binghamton and the CNJ (which is an affiliate of the C&O-B&O system) at Wilkes-Barre; on the east, at Mechanicville, the B&M which runs to Boston and to Portland, Me.; and on the north, the Canadian railroads in the Montreal area. (R. 1329)

A principal competitor of the D&H is the Central with its own lines to Boston and Montreal. D&H and Central also compete for traffic to and from points which they both serve in the Albany area. The merger of Penn and Central would thus convert a principal interchange connection—Penn—into a direct competitor. (R. 1329-30)

D&H's other principal rail competitor is the New Haven. The Commission's authorization contemplates the subsequent inclusion of NH in the Penn-Central system once terms for such inclusion are worked out and the necessary steps to effect such inclusion have been taken. Such inclusion would of course add to the D&H losses caused by the Penn-Central merger. (R. 1330)

It was in the light of this background that the Commission's Hearing Examiners in the Penn-Central case analyzed the merger's effects on the D&H traffic and the D&H study thereof above mentioned. The D&H estimate of a $4,120,000 annual loss of freight revenue did not take into account additional losses from the "snowballing" effects of the merged system on D&H traffic. As was testified in the proceeding before the Commission, the "snowball" effects of a merger are the losses of traffic resulting from a curtailment of one's own service and that of one's connections upon whom one is dependent for the

interchange of traffic, which effects are set in motion by the initial loss of traffic caused by the merger. As traffic is lost, service deteriorates, which results in further losses of traffic, and so on. (R. 1330-31)

The Commission's Examiners found as follows (Recommended Report, p. 364):

> "*It is our opinion that the losses projected by D&H are largely substantiated of record.* Although undoubtedly the latter will increase its volume of traffic through solicitation of carriers operating in competition with the merged system, *it will be completely engulfed by such system through the extension of P.R.R.* [i.e., Penn] *direct lines to Canada and New England.* . . . This essential problem is further compounded by the fact that P.R.R., and its subsidiary L.V., now provide D&H with a substantial interchange. After merger, however, the merged system will unquestionably seek to obtain the longest haul, and in light of its improved service, would very likely divert a substantial volume from D&H lines." [Emphasis added]

The Examiners stated (*Id.* at 365):

> "We, therefore, must conclude that in the event the proposed merger were approved and D&H were to remain an independent railroad, that it would suffer a material loss of traffic as a direct result of the proposed merger, and we so find."

Subsequently, the Examiners put it this way: The D&H "would face a substantial diversionary impact if and when the instant merger is consummated." (*Id.* at 415).

The Examiners also recommended a finding that D&H not be permitted to pursue inclusion in Penn-Central unless and until it was foreclosed from inclusion in N&W or it appeared inclusion in N&W was not possible of accomplish-

ment, having found it "highly likely" from the standpoint of competitive balance that the public interest would be better served by inclusion of D&H, EL and B&M in the N&W system than in Penn-Central. (*Id.* at 415).

The Commission in its Report of April 6 authorizing the Penn-Central merger adopted the findings and conclusions of the Examiners in the foregoing respects (327 I.C.C. 475, 481), made additional findings and imposed the conditions discussed below.

4. Protection of Service Performed by D&H.

The Commission, treating D&H, EL and B&M together, made the following specific basic findings with respect to those roads in its April 6 Report:

> 1. "The service the three petitioners render their shippers is essential and the public interest dictates that it be preserved." (327 I.C.C. 475, 529)
>
> 2. "Unless somehow protected, through inclusion herein or by some other equitable means, the petitioners would be adversely affected by the proposed merger to a serious degree and would be severely handicapped in providing required transportation to the highly industrialized areas they serve." (*Id.* at 529)
>
> 3. "It is doubtful that, without inclusion in a major system, these three carriers could withstand the competition of the applicants merged, and, *unless* they are *protected* during the period necessary to determine their future, *we would not authorize consummation at this time,* even though approving the merger." (*Id.* at 532) [Emphasis added]

Thus the Commission saw two alternative ways of providing protection for D&H, EL and B&M and the service they perform prior to consummation of the Penn-Central

merger: (1) inclusion in a major system; (2) special protective conditions.

Instead of delaying consummation of the Penn-Central merger until inclusion of the three carriers in a major system, the Commission determined to impose special conditions designed to protect the three railroads "during the period necessary to determine their future". The Commission concluded:

> "Our approval of the merger for undelayed consummation shall be subject, therefore, to the conditions specifically described in Appendix G." (*Id.* at 532.)

These Appendix G conditions (*id.* at 532-34, 561-63) were of two kinds: (1) traffic conditions designed to prevent diversion of D&H, EL and B&M traffic to a Penn-Central system, and (2) provisions designed to require Penn-Central to indemnify the three railroads against loss of revenue to the extent and under the circumstances specified in the Report. These conditions were novel and had never been the subject of any hearing.

The conditions of Appendix G were attacked as insufficient by D&H, as well as by EL and B&M, on petitions for reconsideration addressed to the Commission. The basic position of the D&H was and is that instead of permitting consummation of the Penn-Central merger now, the consummation thereof should be delayed until D&H is actually included in one of the major systems. Alternatively, D&H requested that the conditions be revised prior to consummation of the merger in the form proposed by D&H in its petition for reconsideration. (R. 31-73)

Issues as to the Appendix G conditions raised by D&H included primarily the fundamental inadequacy of the period of protection provided by the Appendix G conditions; the inadequacy and inequity of certain of the provi-

sions as to indemnity; and the obvious necessity for a large number of modifications of the traffic conditions, designed principally to clarify the conditions to accord with what the D&H believed was the intent of the Commission. D&H further questioned the practicability of the traffic conditions, even as proposed to be revised, in view of the extensive "policing" they would entail. (R. 39-49)

Another significant issue raised by D&H in its petition for reconsideration, which it had also previously pressed, concerns the necessity of imposing upon the proposed Penn-Central system a condition that, if D&H is to be included in the N&W system, Penn-Central should be required to compensate D&H for any loss, on account of the adverse effect of Penn-Central on D&H traffic and revenues, of the going concern or "capital" value of D&H if any such loss is reflected in the terms ultimately fixed by the Commission for inclusion of D&H in N&W. (R. 48-51). The reasoning behind this request is discussed below. Such protection, referred to by the Commission as the proposed "capital loss indemnification", is to be distinguished from the revenue indemnity for year-to-year operating losses provided in the April 6 Report.

Other parties, including N&W, C&O, B&O, CNJ, Reading and Chicago & Eastern Illinois Railroad Company (C&EI), filed petitions for reconsideration in opposition to the Appendix G conditions, principally the revenue indemnity provision, on the ground that such conditions would affect their traffic and revenues adversely to a serious degree. These other railroads further charged that such indemnity provision would be both unlawful and contrary to the public interest. (B-36-37) Because these petitions for reconsideration raised questions as to the enforceability of the Appendix G conditions in the absence of hearing thereon affording such railroads the opportunity to offer evidence concerning the same, D&H also requested in its petition for

reconsideration that further hearing on such conditions be held in order that the enforceability of those conditions be assured. (R. 48)

The petitions for reconsideration were not acted on prior to the initiation on September 8, 1966 of the action to review the April 6 Report in the Court below. Thereafter, the Commission, by Report and Order on reconsideration, dated September 16 and distributed September 19, 1966, rescinded the indemnity provisions of Appendix G and set for a further hearing (subsequently fixed at October 31, 1966 by the aforesaid Order of the Commission dated September 29, 1966) the following questions:

> "(1) in what respects the conditions already imposed in appendix G should be modified; (2) what, if any, modification is needed to prevent manipulations of the type referred to by C&EI or other petitioners; and (3) whether or not the capital loss indemnification provision should be imposed." (B-42)

The Commission stated in said Report that it is its intent that

> "... all the provisions of appendix G will be subject to the further hearing and further consideration, and such modification thereof as may be found appropriate will be made effective as of the date prescribed in a modification order, except that any provision which may be decided upon for the payment of indemnities will be made applicable retroactively to the date the merger is consummated; and acceptance of these terms and their full observance shall be a further condition to consummation of the merger." (B-44)

Although setting the three issues above mentioned for further hearing, the Commission found that there should be

no delay in the consummation of the merger. It thus left undisturbed the effective date of its authorization of the merger which had been previously fixed as September 30, 1966. (B-16, 44)

5. Court Proceedings.

The action below was instituted by EL on September 8, 1966 to set aside the Commission's Order of April 6, 1966, and on the same date D&H sought leave to intervene as a party plaintiff in said action. The intervention of D&H was granted by Order of Judge Levet of the United States District Court for the Southern District of New York on September 14, 1966. (R. 18) Separate actions were instituted in said District Court by various other parties. Applications for a temporary restraining order and preliminary injunction were made before the specially convened District Court of three Judges who entered a temporary restraining order pending their deliberations (R. 2932-33). Because the Commission's September 16 Report and Order was distributed only two days prior to the oral argument before the District Court, that Court stated at the argument that the complaints and other papers previously filed would be deemed to apply to the September 16 Report and Order without formal amendment. (R. 2737-38)

The preliminary injunction requested by D&H and other parties was then denied by Order entered on October 4, 1966, Judge Weinfeld dissenting. In accordance with the procedure outlined in the opinion of the Court below (A-39), an Application for Stay of the Commission's Orders of April 6 and September 16, 1966 pending appeal of the decision of said District Court was filed by D&H in this Court on October 7, 1966. The Jurisdictional State-

ment of D&H was filed in this Court on October 14, 1966. Appeals, applications for stay and jurisdictional statements have also been filed by various other parties.

By Order of this Court, dated October 18, 1966, a stay pending the appeals was granted, and an expedited procedure for hearing the appeals on the merits was set.

SUMMARY OF ARGUMENT

I

The Reports and Orders of the Commission are unlawful in authorizing immediate consummation of the Penn-Central merger without determining the conditions necessary to protect D&H, EL and B&M and their service essential to the public from the serious adverse effects of such merger which, as the Commission has found, would result if D&H, EL and B&M were required to continue to operate as independent carriers.

The Commission having found it would not permit "undelayed consummation" of the merger without protection of D&H, EL and B&M and their service against such adverse effects, such protection is necessarily a condition precedent to consummation of the merger. The conditions to effect such protection must therefore be determined prior to consummation of the merger; otherwise, in view of the Commission's own findings, "undelayed consummation" of the merger cannot lawfully be found to be consistent with the public interest as required by Section 5(2) of the Interstate Commerce Act.

The need for pre-merger determination of these conditions is highlighted by the Commission's action in its September 16 Report. The Commission had found in its April 6 Report that both special traffic conditions and a revenue indemnification provision were necessary to pro-

vide the requisite protection to the three roads. The Commission's September 16 Report, however, rescinded such indemnity subject only to possible retroactive reinstatement in some form and further provided that it not only might make modifications of the traffic conditions but also that such modifications would be effective at a date yet to be determined. Nevertheless, it authorized the merger to proceed before determining these matters. Its own findings in the April 6 Report as to the nature and scope of the protection required for D&H demonstrates that by its September 16 Report the Commission has failed to determine essential conditions precedent to consummation of the merger.

Deferral until after merger of the hearing found necessary before these essential protective conditions can be determined is a denial of due process and a violation of Section 5(b) of the Administrative Procedure Act and Section 5(2) of the Interstate Commerce Act.

By its September 29 Order establishing the hearing date for the three issues determined in its September 16 Report to be made the subject of the further limited hearing, which began on October 31, 1966, and further fixing the order in which those three issues should be heard, the Commission has given priority to the question whether there should be any capital loss indemnification for D&H, EL or B&M. As stated above, the request of D&H for such an indemnification is predicated upon the assumption of a subsequent Commission authorization of its inclusion in the N&W system upon terms which may reflect a downward adjustment in the present capital or going concern value of D&H on account of the adverse effects of a Penn-Central system on the traffic and revenues of D&H. In setting the capital loss indemnity matter as the first order of business the Commission has recognized the major significance, from

the standpoint of the public interest in the preservation of rail competition, of the possible necessity for such an indemnification in the event it determines that D&H should be included in N&W under such circumstances. This is a matter requiring pre-merger determination, particularly since Penn and Central contend that the Commission lacks power to require such capital indemnity and thus have expressly reserved their right to seek judicial review of any determination of such an indemnity.

II

The Reports and Orders of the Commission are unlawful in authorizing immediate consummation of the Penn-Central merger because the conditions thereto are insufficient to protect D&H and its service to the public and are therefore not just and reasonable as required by Section 5(2) of the Interstate Commerce Act.

The Commission's initial determination that both special traffic conditions and a revenue indemnity provision would be necessary to protect D&H and its service to the public shows the inadequacy of the existing traffic conditions to provide such protection now that the indemnity provision has been rescinded.

The conclusions of the Court below in regard to the effectiveness of the existing traffic conditions constitute unwarranted rationalization of the Commission's Report and speculation in violation of established principles of judicial review of administrative orders.

D&H would suffer irreparable injury if the merger were consummated on the conditions presently provided by the Commission because such conditions would be ineffective to prevent the harm to D&H which, as the Commission has found, would flow from the merger if D&H were to continue

to operate as an independent carrier. By converting a friendly connection—Penn—into a direct competitor for virtually all of D&H's substantial business as an overhead carrier, as well as business handled by D&H at points also served by Central, the merger itself would in effect encourage the routing by shippers of traffic over the lines of the Penn-Central system and away from D&H regardless of the restrictions contained in the present traffic conditions on changes by Penn-Central in its service, rates and routes. In addition, those conditions cannot as a practical matter prohibit affirmative and effective solicitation by the merged system of shippers for such routings. Also, as the Court below found, protection is essential "pending inclusion" of D&H in one of the Eastern systems—but the existing conditions do not provide protection for such period; nor do they even provide protection pending approval of such inclusion despite the findings of the Commission as to the need for such inclusion.

III

The Court below erred in holding that D&H would have adequate judicial review if its review were confined to review of Commission determinations made subsequent to merger.

Prior to the further hearings it is not possible to know whether any conditions fair to all parties may be imposed, or whether such conditions as are imposed will be effective or adequate. The speculation of the Court below that adequate and effective conditions will result after further hearing is unwarranted. Furthermore, if D&H were successful in a court challenge of any inadequate or ineffective conditions imposed by the Commission subsequent to merger, the time involved in securing review and further

Commission action might well be such as to permit substantial diversion of its traffic and revenues, and it is recognized by both the majority and dissenting opinions below that divestiture or dissolution of the merger is not a realistic remedy.

IV

The Reports and Orders of the Commission are unlawful because the bases for immediate consummation of the Penn-Central merger relied on by the Commission are without support.

What appears to have been the Commission's principal ground for approving immediate merger—its concern as to the effects of a delay in consummation of the merger on NH's chances for inclusion in Penn-Central—was expressly and correctly found to be without substantial basis by both the majority and dissenting Judges below.

The other ground relied on by the Commission, and also by the Court below, concerning delay in the realization of the merger benefits by the merging roads and the public, is without rational basis and not supported by findings as to what, if any, benefits would flow from the merger consummated immediately but subject to the conditions now provided.

V

The Court below erred in passing off as "jockeying for price and position" the efforts of D&H to prevent substantial harm to itself and to the public dependent upon it for essential service through obtaining assurance of effective and adequate protection.

ARGUMENT

I

AUTHORIZATION OF IMMEDIATE CONSUMMATION OF THE PENN-CENTRAL MERGER WHILE DEFERRING UNTIL AFTER MERGER HEARINGS ON AND FINAL DETERMINATION OF ESSENTIAL CONDITIONS FOR PROTECTION AGAINST THE ADVERSE EFFECTS OF SAID MERGER ON D&H, EL AND B&M, WHICH PROTECTION WAS FOUND NECESSARY TO MAKE THE MERGER CONSISTENT WITH THE PUBLIC INTEREST, IS UNLAWFUL

The Commission's findings in its April 6 Report, enumerated above, pages 13 and 14, constitute findings as to matters on which the Commission is specifically required to consider by clauses (1) and (2) of paragraph (2)(c) of Section 5 of the Interstate Commerce Act; i.e., the effect of the merger on adequate transportation service to the public, and the effect on the public interest of the failure to include in the merger other railroads in the territory involved.

Acting under those provisions, the Commission has found that the D&H service, and that of EL and B&M, is "essential and the public interest dictates that it be preserved"; that unless protected "through inclusion or by some other equitable means", these three roads would be "severely handicapped in providing required transportation"; that "without inclusion in a major system", it is doubtful these three roads "could withstand the competition" of Penn-Central; that unless they are protected, the Commission "would not authorize consummation at this time even though approving the merger" as such; and that therefore its approval for "undelayed consummation" of

the merger "shall be subject" to the conditions of Appendix G.

It could not be clearer that the Commission has found that special protection for D&H, as well as EL and B&M, is not only necessary to make the merger consistent with the public interest but also an essential condition precedent to its authorization permitting consummation of the merger without delay.

Initially the Commission, in the April 6 Report, actually determined special provisions which it considered would provide that essential protection, i.e., the provisions of Appendix G which contain both traffic conditions and a revenue indemnity. By its September 16 Report, however, the Commission rescinded the provision relating to indemnity, subject to possible reinstatement in some form after hearing; and it opened up the special traffic conditions to modification after hearing, the effective date of which the Commission left open to future determination.

In leaving these matters to further hearing *after* consummation of the merger, the Commission failed to complete the job of imposing conditions necessary to make consummation of the merger "consistent with the public interest" as required by Section 5(2) of the Interstate Commerce Act. The lower Court's affirmance of the Commission's actions and its conclusion (A-24-26) that the Commission, after having made the necessary "vital findings" as to the effect of the Penn-Central merger on the D&H, might leave for subsequent determination urgently important questions as to the protection for the D&H, EL and B&M (necessary in order to satisfy the Commission's "vital findings"), is error.

In essence, the Commission and the Court below have failed to recognize the distinction between conditions prece-

dent and conditions subsequent to a transaction approved under Section 5(2). An example of a condition subsequent in the Commission's Report of April 6 is its provision expressly contemplating the subsequent filing by the NH of a plan for inclusion of NH in Penn-Central (paragraph 8, of Appendix A to the Commission's Report, 327 I.C.C. 475 553). A further illustration of such a condition subsequent is the provision in paragraph 9 of Appendix A (327 I.C.C. 475, 553), as revised by the September 16 Report (B-32), contemplating the subsequent filing by D&H, EL and B&M of supplemental petitions for inclusion in Penn-Central if their petitions for inclusion in the N&W system in Finance Docket No. 21510 should be denied.

But insofar as the protection for D&H, EL and B&M pending determination of their inclusion petitions is concerned, it is clear that the Commission's own finding as to the necessity for protection of these lines makes such protection a condition precedent to the transaction; for, without such protection, as the Commission found, it would not authorize "undelayed consummation" at this time. The mere fact, relied on by the Court below, that the parties to the merger have agreed in advance to whatever protective conditions may ultimately be established restricting traffic and providing revenue indemnity, cannot alter the fact that it is necessary that those conditions be established prior to consummation of the merger before the lawfulness of the merger itself can be determined.

The conditions for protection of D&H, EL and B&M, under which the merger may proceed, are findings just as "vital" as the finding of the need for such conditions and it is only the conditions themselves, as spelled out and considered by the Commission vis-a-vis the merger, which can make this merger consistent with the public interest.

The cases cited by the Court below as support for its conclusion, *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419 (1951); *American Trucking Ass'ns, Inc.* v. *United States*, 355 U. S. 141 (1957); and *American Trucking Ass'ns, Inc.* v. *Frisco Trans. Co.*, 358 U. S. 133 (1958), are inapposite. They involve the Commission's reservation of power to implement a previously found condition, the ordinary reservation of power to cope with a subsequent change in circumstances, or the power to correct inadvertent ministerial errors.

We do not question the Commission's power to reserve jurisdiction to reconsider after merger the efficacy and appropriateness of any protective conditions which it finds prior to consummation of the merger to be necessary in the public interest. See Section 5(9) of the Interstate Commerce Act. What is improper here is the Commission's postponement of the exercise of its duty to establish and impose terms and conditions which are essential to the authorization of this merger until after the merger occurs.

It is also to be noted that it was not a change in circumstances between April 6 and September 16 as to the *need* for protection which led the Commission to rescind the revenue indemnity provision. What happened in the interim were allegations by a number of other railroads that such an indemnity would be unlawful and contrary to the public interest, as well as criticisms by D&H, EL and B&M that the indemnity provision in the April 6 Report was inadequate. In meeting those contentions by rescinding the indemnity provision entirely, subject only to possible reinstatement after hearing, the Commission has failed to maintain the protection which it, itself, has found necessary as a prerequisite to "undelayed consummation" of the merger.

Because, as the Commission has found, the existence of the D&H and the adequacy of its service hang in the balance, and because the Commission itself has concluded that a further hearing is necessary in order to determine conditions essential to protect D&H, deferral of that hearing until after the merger is accomplished would be a clear denial of due process. As was stated in *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 153 (1941), "requisite hearing" must be held "before the final order becomes effective." This Court has further said, in *Morgan* v. *United States*, 304 U. S. 1, 14-15 (1938):

> "[I]n administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process."

Surely the statutory purpose in providing for public hearings under Section 5(2) of the Interstate Commerce Act and Section 5(b) of the Administrative Procedure Act cannot be satisfied unless hearing on conditions essential to "undelayed consummation" of the merger is held *before* consummation of the merger in this case.

In its September 16 Report and Order the Commission has specified that one of the issues to be determined on further hearing is whether there should be imposed upon Penn-Central a capital loss indemnity requirement of the type suggested by D&H and others. The Commission in its September 29 Order, moreover, has directed that this issue be heard first (C-2).

The reasoning behind D&H's request for such an indemnity is as follows: Normally, a railroad seriously threat-

ened by a merger, and thus in need of inclusion in a larger system to assure preservation of essential service to the public, would upon its petition be included in that merger which would adversely affect it. This is clearly contemplated by Section 5(2)(c) of the Interstate Commerce Act requiring consideration by the Commission of the effect on the public interest of the exclusion of other roads from the merger, and Section 5(2)(d) of the Act empowering the Commission to require the inclusion of other railroads in the merger. Here, however, in order to preserve rail competition, D&H, together with EL and B&M, more logically belong in another system, the N&W.

As set out in the Statement of the Case, petitions of those three roads for inclusion in the present N&W system, pursuant to the terms of Appendix O contained in the Report approving the N&W-Nickel Plate-Wabash unification, are pending. In those inclusion proceedings, N&W has urged the Commission that no terms can be found upon which such inclusions can be effected which would be equitable to N&W unless the Commission substantially reduces the price which N&W would otherwise pay for the properties of those three roads if there were to be no Penn-Central merger. (R. 33-34) Thus, if that N&W position is ultimately upheld,* the Commission, in its efforts to find a way to provide for inclusion of the three protected roads in a system other than Penn-Central, will be faced with the dilemma of being unable to find terms equitable to N&W which are at the same time equitable to the roads seeking inclusion. If the Commission were to determine that D&H should be included in N&W rather than in Penn-Central in order to preserve

* It is the position of D&H in those inclusion proceedings that the traffic advantages to N&W of inclusion of D&H would offset the adverse effects of Penn-Central on D&H. (R. 34) However, until final determination of those proceedings, D&H must recognize the possibility that the N&W position may be adopted.

rail competition, but were to impose upon N&W terms for inclusion reflecting a reduction in D&H's present value because of the adverse effects on D&H traffic caused by the Penn-Central merger, D&H obviously should not be expected to suffer such loss in value. Rather, we submit, Penn-Central should be required to make up the difference, both because it would be the cause of any such loss of value and because the inclusion of D&H in another system is necessary if the public interest in continued rail competition is to be served. It is thus in recognition of the public interest that, if possible, terms equitable to all parties be found for inclusion of D&H in a competitive system that the so-called capital loss indemnification has been requested by D&H.

The Commission's direction in its September 29 Order that the issue as to capital loss indemnification be accorded precedence in the hearings now under way shows the importance of this element in the overall program of protection which may be necessary to preserve the essential services of D&H, EL and B&M.*

Yet Penn and Central deny the power of the Commission to require such indemnification, and they have specifically reserved, with the Commission's approval in its September 16 Report, their right to judicial review of any order of the Commission imposing a condition providing for such an indemnification (B-43).

We submit that from the standpoint of the preservation of rail competition, a final determination as to whether Penn-Central should be required to provide any necessary capital loss indemnification under the circumstances here

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* In denying a petition of NH, dated November 1, 1966, to defer hearings on the capital loss issue, the Commission, by its Order of November 10, 1966 in the Penn-Central case, has confirmed the importance of this issue by referring to the necessity for "timely hearing" of the three issues set for hearing by its September 29 Order, and for "a resolution as therein prescribed."

requested by D&H is essential before the merger is consummated. As the Hearing Examiners found (Recommended Report, pp. 419-20), a finding adopted by the Commission (327 I.C.C. 475, 481), a Penn-Central merger would clearly violate the antitrust laws were it not for the overriding effect of the Commission's approval under Sections 5(2) and (11) of the Interstate Commerce Act. The Commission, therefore, in weighing the policies of the antitrust laws in determining whether that merger is consistent with the public interest, must make accommodation of the merger to the policies of the antitrust laws before authorizing the merger. *Minneapolis & St. Louis Ry.* v. *United States,* 361 U. S. 173, 186 (1959). See also *McLean Trucking Co.* v. *United States,* 321 U. S. 67 (1944); *Seaboard Air Line R. R.* v. *United States,* 382 U. S. 154 (1966). Provision for the capital loss indemnification as a possibly essential ingredient in maintaining rail competition in the future is such an "accommodation" which should be made before the merger may be effectuated. Certainly threshold issues as to the Commission's power to provide such an indemnification should be required to be finally determined before the merger may be accomplished.

II

THE COMMISSION'S ORDERS AUTHORIZING IMMEDIATE CONSUMMATION OF THE PENN-CENTRAL MERGER ARE UNLAWFUL BECAUSE THE CONDITIONS PROVIDE FOR INADEQUATE PROTECTION FOR D&H AND THUS ARE NOT JUST AND REASONABLE. THE COURT'S AFFIRMANCE OF THE COMMISSION'S ORDERS IN THIS RESPECT IS IMPROPERLY BASED ON POST HOC RATIONALIZATION AND SPECULATION

The Commission in its April 6 and September 16 Reports has uniformly treated the traffic conditions and revenue indemnity provision of Appendix G together as one bundle of protection. Thus *both* the traffic conditions and the revenue indemnity provision were stated by the Commission in its April 6 Report to be "designed to temporarily maintain, as nearly as possible, the status quo as to traffic for which these three petitioners compete with the applicants and other carriers comprising the merged system" (327 I.C.C. 475, 532). Throughout that Report, both the traffic and indemnity provisions were viewed as "the conditions". This treatment is emphasized by the Commission's September 16 Report (B-14) where the Commission again described *both* the traffic conditions and the indemnity provision as "unique conditions designed to maintain the traffic status quo for these three railroads".

By rescinding the provisions for revenue indemnity by a merged Penn-Central system against loss of traffic suffered by D&H, EL and B&M, subject only to possible reinstatement after further hearing, the Commission shifted the entire burden of providing the necessary protection onto the traffic conditions contained in Appendix G. Whether or not it might be possible to develop some traffic conditions

which would be sufficient alone to avoid injury to the other roads (and we do not believe that it is possible), it is obvious that the existing Appendix G traffic conditions were not so designed or considered by the Commission. The existing traffic conditions without the further revenue indemnity provision, therefore, would appear by the Commission's own findings to be inadequate.

Nevertheless, the Court below concludes (A-22) that the special traffic conditions of Appendix G were by themselves designed "to preserve the premerger *status quo*". In so doing, the District Court substituted its own judgment for that of the Commission on the highly critical issue as to the adequacy of the protection after the September 16 Report and Order and prior to any modification following further hearings. Substitution of the conclusion that the traffic conditions *alone* were intended to preserve the status quo was a "post hoc rationalization" in violation of the principles established in *Burlington Truck Lines* v. *United States*, 371 U. S. 156, 169 (1962). There it was stated:

> "For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review."

See also *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947), stating the "fundamental rule" of administrative law to be:

> ". . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress

has set aside exclusively for the administrative agency."

In its assessment of the significance of the traffic conditions of Appendix G, the Court below was struck by the fact that they are "unprecedented" and go "far beyond anything in previous history" (A-10-11, 28), as if this were a reason in itself for finding them to constitute sufficient protection. But the Penn-Central merger also is "unprecedented" and would "go far beyond anything in previous history" in the extent of its adverse effects on other carriers in the East. A very real question presented by this merger is whether any traffic conditions would be sufficient to protect such a carrier as D&H; certainly the Court below erred, for reasons which we discuss below, in indicating that the Appendix G traffic conditions alone would suffice.

The Court's further statement in this regard (A-28) that the Commission's finding that there should be indemnity conditions designed "'to prevent any loss of revenue . . . as a direct result of immediate consummation of the merger'", while "doubtless within its powers . . . [is] beyond the [Interstate Commerce] Act's demands", is also erroneous. Section 5(2) of the Interstate Commerce Act says that to be approved a merger must be found by the Commission to be "consistent with the public interest". Therefore that which the law demands is what the Commission properly concludes the public interest requires in each particular merger situation; and if the Commission properly concludes, as the Court here has found that it may, that it is in the public interest that no loss of revenue should be suffered, then that is what the law demands.

Turning to the specific inadequacies of the protection now provided by the Commission, that is, the special traffic conditions of Appendix G, it is important to recall the

D&H's estimate of its loss as an independent carrier in the face of a Penn-Central merger and to evaluate the probable effect of the special traffic conditions on such traffic diversion.

Without any protection through special traffic restrictions, as noted in our Statement of the Case herein, pages 9-10, D&H, if it were to continue as an independent carrier, would lose more than $4,000,000 a year, or over 10% of its gross freight revenues, as a result of the Penn-Central merger, assuming, as heretofore stated, no deterioration in its service or that of its principal connections. The Commission has concluded that it is doubtful that as an independent carrier D&H could withstand the competition of Penn-Central. The evidence before the Court below further shows that the rate at which the D&H loss would be experienced would be about 35%, or well over $1,000,000, by the end of the first year following the Penn-Central merger, and that the full effect of the annual $4,000,000 loss would be felt by the end of five years.* (R. 343)

It must of course be recognized that there is no testimony in this proceeding as to the precise loss which D&H would experience if the Penn-Central merger were consummated subject to the Appendix G traffic conditions. However, in view of the D&H situation it is likely that the loss, even with the special traffic conditions of Appendix G in effect, would be substantial.

The Appendix G traffic conditions are designed to prevent the Penn-Central system from instituting new or changed service, rates or routes that would result in a diversion of D&H, EL and B&M traffic. In this connection certain basic facts as to railroading must be kept in mind.

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* The Court below in this connection refers (A-30) to D&H testimony that "it would take a little while for the adverse effect to flow." It is clear from the context of this testimony (R. 193, 343-44) that it was made with reference to when the effect of the full $4,000,000 a year loss would be incurred.

The freight traffic of each railroad falls into four basic categories: (1) local traffic, i.e. traffic handled by the same railroad from origin to destination; (2) forwarded traffic, which is originated by the railroad and interchanged with another railroad prior to destination; (3) terminated traffic, which is handled by the railroad to destination after being received in interchange from another railroad; and (4) bridge or overhead traffic, which is received from one railroad and delivered to another. A large number of railroads may of course participate in any particular movement as, for example, transcontinental traffic.

Under Section 15(8) of the Interstate Commerce Act the shipper (or by arrangement between shipper and consignee, the consignee) has the right to specify any routing of freight traffic which may be provided in a published tariff, and the Commission has here referred (327 I.C.C. 475, 511) to an estimate that as to 85% of the traffic the shippers (including within that term for this purpose consignees) do specify the routing.* Thus the railroads themselves determine the routing only as to a small proportion of the traffic. It is to be noted that the fact that two railroads have a physical interchange point does not necessarily mean that the shipper may specify a routing via such point, since a route via that interchange may not have been published in an applicable tariff. However, generally speaking, there are several competitive routes via numerous railroads which are available for specification by the shippers.

Because shippers have the right to specify a particular route for the movement of their traffic, each railroad is actively engaged in the solicitation of shippers for favor-

* The estimate is apparently based on the study described in the Examiner's Recommended Report, pages 294-95, where it is stated that shipper routing is *complete* as to 87.4% of the traffic; moreover, as to the remaining 12.6% the shippers may provide some limited routing instructions.

able routings; and solicitation "for the long haul", i.e. for the movement which will produce the maximum revenue, is the cardinal rule of traffic solicitation in the railroad industry. (Examiners' Recommended Report, pp. 159-60; R. 2919-20)

It appears universally recognized that, as a general matter, the railroad which originates a freight movement has the greatest influence on shippers in securing favorable routings and thus the originating carrier commonly secures from the shipper a specification of the originating carrier's long haul in the routing. This reflects the extensive services performed by the originating carrier, as distinct from the other carriers in a multi-line movement, in connection with the supplying of the necessary freight car to load the freight and the furnishing of facilities and services in connection with the loading. Because the terminating carrier also provides in many cases substantial facilities and services in connection with the unloading of the shipment, the terminating carrier also is generally favored with its long haul, to the extent this is consistent with providing the originating carrier with its long haul. Thus a carrier performing only overhead service in a multi-line movement is in the least favorable position to influence the routing of the traffic and so overhead traffic is generally deemed the most vulnerable of the four basic categories of traffic to diversion to another route. Conversely, of course, local traffic handled all the way from origin to destination is the traffic least vulnerable to diversion. (Examiners' Recommended Report, pp. 165, 173; R. 793, 796, 802, 810, 2283, 2286)

As previously noted, D&H is known as a bridge line since half of its traffic falls in the overhead category. The evidence before the Commission shows that a great deal of the expected loss of D&H traffic, if D&H were to continue as an independent carrier, is traffic which is overhead to

D&H but which originates on the Penn; and another substantial block is traffic overhead to D&H which terminates on the Penn. In addition, there is substantial D&H overhead traffic which is originated or terminated by the Penn's 90% owned subsidiary, the LV.

Thus, regardless of new or improved service which would be proscribed by Appendix G, substantial D&H traffic may be reasonably expected to be diverted *in the normal course* to a Penn-Central combine simply because the merger will extend Penn's lines, and thus its long hauls for its originated and terminated traffic, into and beyond the territory served by D&H.*

Furthermore, by the extension of its lines into New England and Canada through merger with Central, Penn and other carriers in Penn's present system will substantially enlarge their ability to handle traffic all the way from origin to destination. In other words, it will be able to convert certain traffic which is now originated or terminated and interchanged with another road or roads into local traffic. Thus the D&H traffic study in this proceeding showed that D&H stands to lose traffic which it now interchanges with Penn or other carriers in Penn's present system, which can be handled from origin to destination by the Penn-Central system, without any affirmative service improvements (as well, of course, as additional traffic on account of service improvements). (Examiners' Recommended Report, p. 363)

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* We do not mean to imply that Penn and Central today have published a full line of through routes over which all of the D&H traffic originated or terminated by the Penn may be transported under shipper routing. However, as to a great deal of the traffic involved, there are available Penn-Central routes which would provide the Penn-Central system with long hauls to the exclusion of D&H from the routing, even while the system is subject to the Appendix G restriction that it may not establish new or changed routes or rates that might have the effect of diverting D&H traffic.

In this connection it is to be noted that the Commission itself, in referring to the "numerous service advantages" which shippers may expect as a result of the merger, referred first to "single-line service between more points, with less route-circuity, less handling of freight, less switching of cars, and consequently less likelihood of damage, less time in transit and terminal, and easier tracing of shipments." (327 I.C.C. 475, 491) Single-line handling in itself is thus deemed highly desirable by shippers who it must be expected in many cases will specifically prescribe a routing of their traffic to take advantage of such handling, regardless of whether any changes in rates, routes or service proscribed by Appendix G are made.

A further illustration of the ineffectiveness of the traffic conditions of Appendix G in prohibiting loss of D&H traffic concerns the matter of solicitation of business. Before the Court below, Penn and Central urged an exceptionally broad interpretation of the Appendix G traffic conditions, going so far as to claim that those conditions would prohibit even solicitation by the merged system of business for its own long hauls if such would divert traffic from the lines of D&H (R. 2860). Whether or not this construction of the Appendix G conditions is correct, it is one which could not as a practical matter be enforced in view of the hundreds of Penn and Central personnel engaged in solicitation of the multitudinous shippers of freight in this country, and the many forms of activity which solicitation may take (R. 2920). Certainly solicitation by Penn-Central for its long hauls would be likely to be successful in many instances in diverting traffic which is overhead to D&H.

Thus the reasons (referred to above, p. 12) which led the Examiners in this case to find that the D&H would "be completely engulfed" by a Penn-Central system through the extension of Penn's direct lines to Canada and

New England are likely, even without improvement in the service, to cause a substantial diversion of D&H traffic.

As the Commission in its September 16 Report points out (B-15), there is no assurance that D&H will be included in any of the large Eastern systems for several years. The longer the conditions last after the Penn-Central merger has gone through, the greater the cumulative loss of traffic and revenue which D&H may experience by reason of their inadequacy.

Furthermore, there is not even assurance that the traffic conditions, inadequate though they are, will last until D&H is included in one of the large systems. In its opinion the Court below states (A-24-25) that the "vital findings from which we would not allow the Commission to depart, at least without complete explanation", upon subsequent judicial review following the current hearing in which modifications of the Appendix G conditions are being considered, include the finding that D&H, EL and B&M would be seriously hurt "pending inclusion" in a merger system unless protected by something more than the standard traffic conditions* and that some special conditions must be devised to obviate such harm. The Commission, however, has not provided protection "pending inclusion". What it has provided, to the limited extent of the present Appendix G traffic conditions, is protection "pending final determination" of the petitions for inclusion in the present N&W system or the Penn-Central system or such other period of time as the Commission may prescribe (327 I.C.C. 475, 561).

Whether or not the words "pending final determination" of an inclusion petition might ordinarily be considered as the fair equivalent of "pending inclusion", that is

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* The standard traffic conditions are set forth in Appendix I to the Commission's April 6 Report (327 I.C.C. 475, 564-65).

not the case here. N&W is willing to include the three roads in its system only on certain conditions one of which, approval of the N&W-C&O merger, is vigorously opposed by Penn and Central themselves. N&W is also contesting any possible inclusion of D&H in the Penn-Central system. No one knows whether the Commission will grant or deny the petitions of D&H, EL and B&M for inclusion in either the present N&W system or the Penn-Central system; or whether the N&W-C&O system will ever be formed.*

In this connection we call particular attention to footnote 4 to the opinion of the Court below (A-10) where it chooses to speculate as to the likelihood of inclusion of the three roads in the present N&W system, without any knowledge of the record in the inclusion proceedings. Reference is made there to the fact that the N&W is bound to accept the inclusion of the three roads, if ordered by the Commission, a statement made in juxtaposition with its statement that a final determination on the N&W inclusion cases may be expected in 1967. The Court fails to point out, however, the fact that the Commission, in imposing the condition for inclusion of the three roads in the *Norfolk & W. Ry.* case, 324 I.C.C. 1, 148 (1964), also stated:

> "It is not intended that acceptance of this condition by applicants herein will foreclose or limit review of any decision of the Commission disposing of a petition filed pursuant to this condition."

But, even if it is reasonable to expect that the inclusion of D&H in the present N&W system will be accomplished, as D&H certainly hopes, within a reasonably short period of

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* Furthermore, the Commission's protective conditions by their own terms would not even endure until inclusion of D&H in the proposed N&W-C&O system if it should be finally determined that D&H should not be included in either the present N&W system or in Penn-Central.

time, there is no justification here, if the "vital finding" is that there must be protection "pending inclusion", that such protection should not be provided *in haec verba*.

In another part of its opinion the Court below appears to retract from its position in regard to the significance of the finding as to the need for protection "pending inclusion" by stating (A-28) that "what the law requires" is that the Penn-Central merger "should not affect the viability of the three carriers between consummation and a fair opportunity for incorporation into a larger system". We have commented above, page 33, as to the Court's error in stating "what the law requires". But regardless of that question, the very least the words "fair opportunity for incorporation into a larger system" can mean, in view of the Commission's "vital findings" as to the ultimate necessity of D&H's inclusion in a major system (327 I.C.C. 475, 529, 532), is a final determination *approving* the inclusion of D&H in a larger system as consistent with the public interest and upon terms found equitable by the Commission. Yet, protection until such approval is not provided by Appendix G, since the words "final determination" of the petitions for inclusion in either the present N&W system or the Penn-Central system encompass the possibility of denial of such inclusion as well as approval, and as indicated above in view of the opposition to granting the petitions for inclusion in either system, the possibility of their denial must be reckoned with.

Thus the Commission's Reports of April 6 and September 16 do not under any theory provide protection for D&H for as long as necessary in view of the "vital findings" of the Commission.

Because the special traffic conditions of Appendix G provide inadequate protection and do not accord with the

Commission's findings, they are not just and reasonable as required by the standard of Section 5(2) of the Interstate Commerce Act. Furthermore, they do not meet the statutory standard because the period during which even such limited protection would be afforded is inadequate.

III.

THE DECISION OF THE COURT BELOW, DENYING INJUNCTIVE RELIEF ON THE GROUND THAT JUDICIAL REVIEW OF SUBSEQUENT COMMISSION ORDERS AS TO PROTECTIVE CONDITIONS WOULD BE ADEQUATE JUDICIAL REVIEW, IS ERROR

The Court below has concluded (A-33-36) that, because D&H and other affected carriers would have the right of judicial review of any Commission determination made after subsequent hearings as to the conditions then to be imposed, their interests are sufficiently protected. This, we submit, is clear error.

The Court below speculates that some effective conditions will be established subsequent to merger (e.g. A-31-32). It is further apparent that the Court assumes (A-24-26) that the only change in the Appendix G traffic conditions that can be made after further hearing is a strengthening of them. Thus the Court refuses (A-36) to admit even the possibility of the Commission finding no provisions which would suffice to reconcile all of the conflicting interests.

The Commission's Report of September 16 provides, however, that further hearing on these conditions is for the purpose of determining "in what respects the conditions... should be modified" (B-42). Furthermore, it is clear from the record (e.g. R. 2668-72) that insofar as the revenue indemnity provision is concerned, N&W and several other roads are strenuously raising objections to reinstatement

of the indemnity on the ground that it would create a community of interests between the three protected roads and Penn-Central which may result in "manipulation" to the disadvantage of the unprotected carriers. And the fact that Penn and Central have expressly waived all right to judicial review of any post-merger modifications of the traffic conditions and revenue indemnity provision does not mean that they are precluded from urging before the Commission either a weakening of the traffic conditions or that no such indemnity be reinstated.

Despite the Court's refusal to admit the possibility that no effective conditions will be established, and after hopefully referring to the possibility of "carefully tailored" provisions which will avoid the feared "manipulation", the Court recognizes the reality of the problem by stating that after hearing "*at the very least* we will have a record and findings as to the effect on these carriers of such provisions as are imposed" (A-26) (Emphasis added.) It may well be that a record is all that we will have, for obviously it *is* possible that the Commission may determine ultimately that no effective conditions can be properly imposed which would adequately protect D&H and its service prior to its actual inclusion in one of the major systems.* If that should occur, certainly the right of judicial review at the conclusion of the further hearing would be meaningless because it is generally conceded that unscrambling this merger is not to be regarded as a realistic remedy (A-35, 60).

Nor can one ignore the possibility that such protective conditions as may ultimately be established may be inadequate. No one knows what changes in the traffic conditions

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* Recognition of the fact that no one can know prior to hearing what will be the Commission's ultimate determination cannot properly be considered, as the Court below would indicate, a "reflection on either the Commission's good faith or its competence." (A-37)

will be made, or when any such changes will be effective. No one knows whether any revenue indemnity provision will be provided. The fact that an indemnity, if any is provided, will be retroactive is no answer. Inadequate conditions would not become adequate by provision for retroactive but inadequate indemnity.

Furthermore, if conditions are imposed which D&H would be able successfully to challenge in the courts as inadequate, the time involved in securing appropriate revision thereof through the processes of judicial review, necessary remand and further Commission consideration, with still further judicial review and Commission consideration possibly necessary, might well be such that diversion of substantial amounts of D&H traffic would occur before the relief was obtained (see Judge Weinfeld, dissenting, A-59-60). The adverse effect of this on D&H service to the public might well be significant, depending on the length of time involved and the amount of traffic diverted; and whether revenue indemnity in any form is to be provided, and if so the nature of the provisions therefor.

The sheer uncertainties inherent in the situation, before the Commission determines the protective provisions, compels the conclusion that for the courts to require reliance solely on post-merger judicial review would be error.

IV

THE COMMISSION'S ORDERS ARE UNLAWFUL BECAUSE THE GROUNDS RELIED ON BY THE COMMISSION FOR AUTHORIZING IMMEDIATE CONSUMMATION OF THE PENN-CENTRAL MERGER ARE NOT SUPPORTED BY A RATIONAL BASIS OR BY NECESSARY FINDINGS; AND THE COURT'S UPHOLDING OF SAID ORDERS ON THE BASIS WHICH IT EMPLOYED VIOLATES FUNDAMENTAL RULES OF ADMINISTRATIVE LAW

After determining to approve the Penn-Central merger, the Commission, in its April 6 Report, considered the remaining issue, insofar as D&H, EL and B&M are concerned, as being whether it should delay consummation of the merger or whether it could provide adequate protection for those three roads on what appeared to it to be a temporary basis pending determination of their future (327 I.C.C. 475, 532). The Commission then imposed the conditions of Appendix G which it designed "to prevent any loss of revenue over the three railroads as a direct result of immediate consummation of this merger" (327 I.C.C. 475, 532).

The Commission made no further finding as to the reasons for authorizing consummation of the Penn-Central merger without delay until decision on the D&H, EL and B&M petitions for inclusion in a major system except the general conclusion that "it would not be in the public interest to deprive the applicants of the immediate benefits of the merger or their shippers, of the improved service the merger will provide" (327 I.C.C. 475, 531). At the same time, however, the Commission recognized that the Appendix G conditions which it imposed would "deny to applicants and some shippers, for the time being, some of the merger benefits" (327 I.C.C. 475, 532).

No finding was made in that Report as to what benefits would accrue with the Appendix G conditions in effect, or the relative significance of those benefits which would accrue under those conditions as compared with the relative significance of the benefits delayed. In fact, the Commission, while implying that shippers would receive some of the merger benefits if it were consummated immediately, actually also indicated a serious concern as to the quantity and quality of any benefits to shippers when it said that at least the Appendix G conditions "*will in no case detract* from the present amount and quality of service being provided by applicants" (327 I.C.C. 475, 532) (Emphasis added).

In its Report on Reconsideration of September 16, the Commission sought to amplify its previous findings and, in effect, relied on two grounds for its conclusion that prompt consummation of the merger would be in the public interest as against a deferral of the consummation until inclusion of D&H and EL in a major system is assured (B-13-16).

One ground relied on by the Commission involved its concern as to the future of the NH (B-15-16). But, as the Court below unanimously concluded (A-22, 62-63), and properly so in view of the uncertainties as to whether NH will ever be included in Penn-Central and the time it would take the NH, which is in bankruptcy, to accomplish such an inclusion, it is unrealistic to "rest heavily" on the alleged peril to NH inclusion of a delay in effectuating the merger. In this connection the Commission pointed out (B-15-16) the possibility that deferral of consummation of the merger might endanger the chances of the merger being effectuated at all, thus depriving NH of even an opportunity for inclusion and risking its liquidation. But, as the majority below said (A-21-22) with respect to this claim, "granting some force to these contentions and acknowledging that immediate consummation would be in the public interest in assist-

ing the Trustees [of NH] in their onerous duties", "the unanimous finding of the Commission that the PRR-NYC merger conditioned on inclusion of NH is in the public interest, well supported and largely unassailed,[*] should give a sufficient measure of the assurance required."

The second ground relied on by the Commission in its September 16 Report for authorizing immediate consummation of the merger concerned the $80,000,000 of annual savings in operating expenses which the merger would produce for Penn-Central and the benefits of the merger to shippers. The Commission found that these savings and benefits justified immediate merger because "a day's delay at the outset of the undertaking can only mean a day's delay at its conclusion and, thus, every day that consummation is postponed denies the shipping and consuming public, as well as the management and owners of these railroads, the many benefits which we found stem from the transaction we approved" (B-15). Again, it is to be noted that the Commission failed to make any finding as to what benefits would be realized from immediate consummation of the merger *subject to the Appendix G traffic conditions.*

In this segment of its September 16 Report entitled "Time of Consummation" (B-13-16), the Commission purported to be addressing itself to the merits of a delay in consummation of the merger as against the merits of immediate consummation subject to the existing Appendix G traffic conditions. It was doing this in a decision where it recognized the inadequacies of such conditions which had been pointed out in the D&H, EL and B&M petitions (B-41) and, furthermore, where it was rescinding the revenue

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[*] In contradistinction to the protective provisions devised by the Commission for D&H, EL and B&M which have aroused such intense opposition from the so-called unprotected carriers as to make dubious what, if any, protection will ultimately be provided by the Commission.

indemnity provision which constituted an integral part of the program originally designed to prevent loss of revenue to those three roads. Likewise, the Commission seems to have recognized that the merger would at least have an adverse effect "gradually" on D&H, EL and B&M (B-14) and furthermore explicitly stated that it might be "several years" before their inclusion was accomplished (B-15) during which such gradual effect would accumulate.

The Commission was therefore required, in order to decide on a rational basis whether to delay the merger, or not to delay the merger but subject Penn-Central to Appendix G, to consider the consequences which Appendix G would have on the benefits which it had found would result if the merger—not restricted by Appendix G conditions—were accomplished. Yet all that the Commission found was what it apparently regards as a truism, that "a day's delay at the outset of the undertaking can only mean a day's delay at its conclusion". In so doing, the Commission not only failed to make findings essential to its conclusion but totally overlooked one highly important fact to which it had seemed to be alert in its April 6 Report: That denial of immediate consummation of the merger may cause no more delay of significant merger benefits to either the public or the merging railroads than would be encountered in operating under the restrictions of the Appendix G traffic conditions, particularly if they are ultimately construed as broadly as Penn and Central have contended (e.g. R. 2850-53, 2856, 2860-62) in their effort in the Court below to secure a denial of injunctive relief. D&H had specifically called the Commission's attention to the problem by pointing out in its petition for reconsideration addressed to the Commission, dated July 7, 1966 (R. 54), that in view of the great extent to which one or more of these roads

is competitive with Penn or Central, it is self-evident that the service improvements to the public which might be made during the protective period would be relatively few and that no finding had been made as to what benefits would flow from the merger under such circumstances. For all that appears, it may be that the benefits of increased single line service, mentioned above, which would follow from the merger without affirmative changes in service which would be barred by Appendix G would be the principal if not the only substantial benefits to the public which would be derived while Appendix G is in effect. Yet, to the extent such benefits would flow they would contribute directly to the losses of traffic and revenue of D&H, EL and B&M which the Commission has found should be prevented. In any event, the Commission in its Report on Reconsideration of September 16, made no finding as to what service improvements would be likely to be made during the protective period, nor what would be the benefits to the merging carriers.

The Court below relies, and apparently relies only, on this unsupported second ground as to merger benefits in the Commission's September 16 Report for the Commission's conclusion on this vital matter of the timing of the merger. Like the Commission, it accepts the thesis that "postponement of consummation will postpone for the same period all the savings and the improved service for the shipping public" (A-19), without even realizing that the Appendix G conditions should cause the same period of postponement of benefits* and without any consideration of the extent or

* We say "should cause" rather than "would cause" the same postponement because, unfortunately from the standpoint of the adequacy of the protection provided, the Commission can, and has expressly reserved the power to, cut short the Appendix G protection under its language that the protection is to endure pending final determination of the inclusion petitions "or such other period of time as the Commission may prescribe." (327 I.C.C. 475, 561)

significance of the savings or improved service that could be accomplished by the merged system subject to Appendix G.

The failure of the Commission to indicate what the benefits to the public would be during the time the merged system is subject to the Appendix G conditions constitutes a failure to make findings on a material issue in this proceeding in contravention of Section 8(b) of the Administrative Procedure Act. Likewise, the Commission's failure to make any findings with respect to the benefits to the merging railroads which would result under a merger subject to Appendix G constitutes a failure to make findings on a material issue in this proceeding.

There must be "a rational basis for the conclusions approved by the administrative body", *ICC* v. *City of Jersey City*, 322 U.S. 503, 513 (1944), and findings which "sufficiently indicate the bases for the conclusions reached." *American Trucking Ass'ns, Inc.* v. *United States*, 3 CCH Fed. Car. Serv. ¶81,853 (D.D.C. 1966).

As was said in *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167 (1962), where this Court ruled that there were "no findings and no analysis" which justified the choice made, and "no indication of the basis on which the Commission exercised its expert discretion":

> "We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice."

To the same effect, *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 488-89 (1942).

Furthermore, the Court's upholding of the Commission's Orders in reliance on but one of the two grounds cited by the Commission while at the same time rejecting the other ground constitutes a failure of the Court to

meet the standards of judicial review of administrative orders established in such cases as *Burlington* and *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947). As was said in *Burlington, supra* at 168-69:

> "Chenery requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself".

Yet the Commission itself could not have properly rested its approval of undelayed consummation of the merger on the mere ground of savings in operating costs and benefits to shippers from the merger, in view of the fact that the Commission had expressed in its April 6 Report considerable doubt as to when and if such savings and benefits would flow in view of the Appendix G traffic conditions which it imposed, and as shown above it has made no findings on the subject in the September 16 Report. Certainly it appears, in view of the Commission's discussion of the NH situation (B-15-16), that the Commission, unlike the Court, did not consider the factors of merger savings and benefits alone to "weigh heavily" on the side of immediate merger, but rather gave primary emphasis to the issue as to NH.

Compare *Pottsville Broadcasting Co.* v. *FCC*, 98 F.2d 288 (D. C. Cir. 1938). There the agency had denied a permit on two grounds, one of which, the one deemed by the court to have been "controlling" in the agency's disposition of the matter, was found erroneous. The court concluded that under its restricted function in reviewing an administrative order it must remand the case to the agency to determine whether the permit would be denied solely on the other ground.

We submit that the Commission's Orders authorizing undelayed consummation of the merger and the affirmance

thereof by the Court below cannot be sustained as a matter of law because of (1) the apparent primary reliance by the Commission on a ground which, as the Court below unanimously found, cannot be accorded substantial weight, and (2) the failure of the Commission to make essential findings in support of the other ground relied on.

V

THE DESCRIPTION BY THE COURT BELOW OF THE ACTION OF D&H IN SEEKING JUDICIAL REVIEW AS "JOCKEYING . . . . FOR PRICE AND POSITION" EVIDENCES A FUNDAMENTAL MISCONCEPTION UNDERLYING ITS ERRONEOUS DENIAL OF INJUNCTIVE RELIEF

The Court below, as we have previously noted, has engaged in a substantial amount of speculation in rationalizing the result reached by the Commission. Relying on what it concludes to be general acceptance by the affected railroads of the desirability of the Penn-Central merger, the Court chose to characterize the actions seeking review of the Commission's Orders authorizing the Penn-Central merger as "jockeying . . . for price and position in respect of other mergers" (A-39).

The Court's approach reflects a failure fully to appreciate the position of the railroad industry in the Northeast on the matter of unification and the responsibilities of railroads affected by unification proposals. It is true that the managements of railroads in this territory, many of them confronted for years with heavy deficits or inadequate earnings, have been in agreement on the essential need for the restructuring of the roads into a limited number of systems in order to meet intermodal competition and keep up with

the demands of the growing economy. But it is also true that the three unifications which have been approved by the Commission have had the blessing of the non-included roads only on the premise that they would be properly included in one or another of those systems. No one, not even Penn or Central, has ever taken the position that the gigantic Penn-Central combine can be divorced from the general merger movement and looked upon individually as a merger consistent with the public interest. The Penn-Central proposal can only be seen in proper perspective when it is realized that a Penn-Central merger is but a part of an overall merger movement and is that part which, unless and until the restructuring is properly completed, has tremendous capability for causing injury to, if not destruction of, the service performed by other railroads, including specifically D&H.

The governing statute today does not permit the Commission to initiate railroad combinations. Rather, they must be voluntarily submitted by managements. On the other hand, once they are so submitted, the Commission is required by the statute to consider the effects on other railroads, and it is empowered, where the public interest requires, to condition approval upon inclusion of such railroads and to fix the terms for such inclusion. The participation of other railroads in the proceedings thus protects not merely their own interests but the interests of those segments of the general public associated with them. Since the amendment to the law by the Transportation Act of 1940, ch. 722, 54 Stat. 898 (codified in scattered sections of 49 U.S.C.), relieved the Commission of the duty to formulate consolidation plans which it bore under the Transportation Act of 1920, ch. 91, 41 Stat. 456 (codified in scattered sections of 49 U.S.C.), railroads affected by a proposed merger have necessarily assumed responsibilities in assisting the Commission to determine whether

the merger is consistent with the public interest and whether their inclusion is required by the public interest.

The restructuring of the entire railroad map in the Northeast has to date been presented in three proceedings. The Commission determined to consider these three interrelated unification proposals on a piecemeal basis despite the pleas on two occasions of D&H as well as other parties to consolidate them for decision.* The principal reason for advocating consolidation was the fact that whereas one merger proposal—Penn-Central—would inflict major harm on other railroads and their ability to serve the public, three of those other railroads—D&H, EL and B&M—should be included in another system if rail competition is to be preserved. It was thought that by dealing with the C&O-B&O, N&W-Nickel Plate and Penn-Central cases together, the Commission could assure both fair treatment for all concerned and the development of a sound competitive balance. Denial of consolidation has left the Commission in the position where, in defense of its view that each case must be decided separately as it comes along, it has approved Penn-Central for immediate consummation before knowing what will be the protection provided for or ultimate treatment of several roads of importance to the public.** In reality, because of the great harm that a Penn-Central system would cause others, it should be the *last* part of the restructuring of the railroad industry into three systems to be accomplished.

If the activity of D&H in participating in the different merger cases is what the Court below dismisses as mere "jockeying", we submit that it has been the only way that

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* *Chesapeake & O. Ry.-Control-Baltimore & O. R. R.*, 317 I.C.C. 261, 266 (1962), and *Norfolk & W. Ry. and New York, C. & St. L. R. R.-Merger*, 324 I.C.C. 1, 16-19 (1964).

** See also, Vice Chairman Tucker, concurring, 327 I.C.C. 475, 549-50.

it could do the job it should do to protect itself and the public it serves, particularly if rail competition is to be preserved. Because of the tremendous competitive impact of a Penn-Central system, the determinations of "position", and of "price" to effect inclusion of the affected carriers in the rail mergers, which the Commission itself indicates to be the only ultimate solution if service which is found essential to the public is to be preserved, are matters of prime public concern; and unless the appropriate "position" of each of the smaller independent railroads in one or another of the major systems is finally established, the merger movement may well turn out to have done more harm than good.

If, on the other hand, by "jockeying" the Court below means to charge D&H with attempting to play off one system against another in an effort to obtain the most favorable terms, the accusation is pure speculation and without any basis in fact. Moreover, all matters of "price" and "position" are, of course, subject to the Commission's jurisdiction, and any attempted overreaching or disregard of the public interest by D&H or any other non-included railroad would be subject to Commission approval both of the terms for inclusion in any system and its determination that inclusion in the particular system which is sought is consistent with the public interest.

The need for adequate protection of the public interest in the preservation of rail service and, if possible, competitive rail service, compels the conclusion that in this instance the conditions to the merger to achieve such goals are as significant as the merger itself. Therefore, until those conditions are finally determined, consummation of the Penn-Central merger should be enjoined.

Conclusion

Appellant requests that this Court reverse the Order of the District Court below and remand this case to said Court with instructions to enter an order (i) enjoining, annulling and setting aside the Commission's Orders of April 6, 1966 and September 16, 1966 insofar as such Orders authorize immediate consummation of the Penn-Central merger and (ii) remanding the case to the Commission for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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November 30, 1966

APPENDIX A

Pertinent Provisions of the Interstate Commerce Act

§ 5(2)(a), (b), (c) and (d) (49 U.S.C. § 5(2)(a), (b), (c) and (d))

(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard.

Appendix A

If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms,

the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

§ 5(9) (49 U.S.C. § 5(9))

(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate.

§ 5(11) (49 U.S.C. § 5(11))

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with

the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

§ 15(8) (49 U.S.C. § 15(8))

(8) In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this part to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this part provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported.

Appendix A

Pertinent Provisions of the Judicial Code

28 U.S.C. § 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1336. Interstate Commerce Commission's orders

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

(c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final.

28 U.S.C. § 2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

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(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial,

and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same: If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State.

28 U.S.C. § 2321. Procedure generally; process

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

28 U.S.C. § 2322. United States as party

All actions specified in section 2321 of this title shall be brought by or against the United States.

28 U.S.C. § 2323. Duties of Attorney General; intervenors

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in

actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

28 U.S.C. § 2324. Stay of Commission's order

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

28 U.S.C. § 2325. Injunction; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Appendix A

Pertinent Provisions of the Administrative Procedure Act

§ 5(b) (5 U.S.C. § 1004(b))

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

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(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

§ 8(b) (5 U.S.C. § 1007(b))

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

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(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative

agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

§ 10(a), (c), (d) and (e) (5 U.S.C. § 1009(a), (c), (d) and (e))

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

• • • •

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order; for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.